WESLEY WISHKENO ET AL.

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 82-40-A Decided December 30, 1982

Appeal from a decision by the Deputy Assistant Secretary--Indian Affairs (Operations) declining to give retroactive approval to an attempted conveyance of Indian trust land.

Remanded.

1. Board of Indian Appeals: Jurisdiction

   The Board has jurisdiction to review a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) that is based upon an application of facts to law.

2. Indian Lands: Allotments: Alienation--Indian Lands: Restricted Allotment

   Under Departmental and judicial precedents, the Secretary of the Interior has the authority to give retroactive approval to the conveyance of Indian trust or restricted land despite the fact that the Indian grantor has died before approval is given.

3. Indian Lands: Allotments: Alienation--Indian Lands: Restricted Allotment

The Secretary or his delegate has the authority to approve a conveyance of Indian trust or restricted land after the death of the Indian grantor if the Secretary is satisfied that the consideration for the conveyance was adequate; the grantor received the consideration; and there was no fraud, overreaching, or other illegality in the procurement of the conveyance.

APPEARANCES: Wesley Wishkeno, Mary E. Wishkeno Delg, Alethia Wishkeno Bedwell, Virginia Wishkeno Cadue, and Wilma Wishkeno Anquoe, pro sese. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On May 17, 1982, the Board received a letter from Wesley Wishkeno, Mary E. Wishkeno Delg, Alethia Wishkeno Bedwell, Virginia Wishkeno Cadue, and Wilma Wishkeno Anquoe (appellants) objecting to an April 5, 1982, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) refusing to give retroactive approval to a warranty deed of Indian trust land. Approval had been sought in the context of the probate of the estate of appellants' father, Arthur Wishkeno.

Background

On August 8, 1980, the Board of Indian Appeals issued a decision in the Estate of Arthur Wishkeno, Docket No. IBIA 80-13, 8 IBIA 147 (1980). That appeal involved the estate of Arthur Wishkeno (decedent), Prairie Band

Potawatomi Allottee 330, who died on May 13, 1978. On July 19, 1979, Administrative Law Judge Sam E. Taylor disapproved decedent's will and determined his heirs. The Administrative Law Judge's decision held that a copy of a will allegedly executed by decedent in December 1958 would not be admitted to probate because the proponent of the will failed to account for the absence of the original and evidence was introduced suggesting that the original may have been destroyed.

At the probate hearing Virginia Wishkeno Cadue, a daughter of decedent and an appellant in the present case, introduced a copy of a warranty deed, purportedly executed by decedent on November 21, 1968, which attempted to convey certain trust lands held by decedent to her. The Administrative Law Judge held that this warranty deed was ineffective to convey decedent's trust lands because the deed had not been approved by the Secretary of the Interior or his delegate, the Superintendent of the Horton Agency, Bureau of Indian Affairs (BIA), as required by law.

In its August 8, 1980, decision the Board held that decedent's purported will was properly denied probate. Concerning the warranty deed to Virginia Cadue, the Board stated at 8 IBIA 148-49:

> The main thrust of appellants' argument is that the purported warranty deed * * * should receive subsequent approval by the Secretary of the Interior and be upheld as a valid instrument. Appellants cite several state and Federal cases in support of their position. One in particular, Lykins v. McGrath, 184 U.S. 169 (1902), held that:
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> > Consent of the Secretary of the Interior to a conveyance by an Indian patentee whose patent prohibits alienation by him or his heirs without such consent may be given after death of the Indian grantor, and when so given is retroactive in its effect, and

> relates back to the date of the conveyance, so as to cut off any claim of the heirs of such grantor to the land.
>
> Whether the purported warranty deed is null and void or whether it was lawful or at least voidable and, therefore, subject to ratification is appropriately a matter for the Commissioner of Indian Affairs to decide, not this Board. See 25 CFR Part 121. [Now codified at Part 152.]
>
> Because this matter is within the purview of the Commissioner of Indian Affairs, it is referred to the Commissioner for expeditious resolution and return. The decision should include findings of fact and conclusions for incorporation in a final decision by the Board for the Department regarding decedent's estate. [Emphasis in original.]

On April 8, 1982, the Board received a memorandum dated April 5, 1982, from the Deputy Assistant Secretary--Indian Affairs (Operations), which, after a brief recitation of facts, stated:

> After analyzing the record and related legal opinions on the retroactive approval of deeds by the Secretary, it is our opinion that there is not sufficient evidence to show that this particular transaction, if retroactively approved, would bar possible equitable claims to title.
>
> We, therefore, are declining to approve the deed, and submit this notice thereof for incorporation in the record.

On April 23, 1982, the Board established a schedule under which parties in this case could respond to the Deputy Assistant Secretary's decision. In a letter dated May 6, 1982, and received by the Board on May 17, 1982, the present appellants filed an objection to the Deputy Assistant Secretary's decision. On May 21, 1982, the Board issued an order stating that it would treat appellants' objection as an administrative appeal of the Deputy Assistant Secretary's decision under 43 CFR 4.331. The order established a briefing schedule for this appeal. No briefs have been filed.

Jurisdiction

In referring to the Commissioner the question whether decedent's warranty deed should receive retroactive approval, the Board acknowledged that the Department's regulations in 25 CFR Part 121 placed this initial determination with BIA. Once rendered, however, that decision, like any other decision of a BIA official rendered under 25 CFR Chapter I, may be reviewed in accordance with the provisions of 25 CFR Part 2 and 43 CFR Part 4, Subpart D to the extent it is based upon an interpretation of law.

Under 43 CFR 4.1(b)(2), the Board of Indian Appeals "decides finally for the Department appeals to the head of the Department pertaining to (i) administrative actions of officials of the Bureau of Indian Affairs, issued under Chapter I of Title 25 of the Code of Federal Regulations, in cases involving determinations, findings and orders protested as a violation of a right or privilege of the appellant." See also 43 CFR 4.330(a)(1). The Board's regulations recognize that those decisions properly issued under the exercise of discretionary authority vested in the BIA may be made final for the Department without Board review. See 43 CFR 4.330(b)(2) and 4.337(b). See also 25 CFR 2.19(c)(1). However, as the Board discussed in Roger St. Pierre v. Commissioner of Indian Affairs, 9 IBIA 203, 219, 89 I.D. 132, 139 (1982), disapproved, in part, on other grounds in Burnette v. Deputy Assistant Secretary, 10 IBIA 464 (1982), the area of discretion recognized by the courts and the Administrative Procedure Act (5 U.S.C. § 701(a)(2) (1976)) as inappropriate for judicial review is quite narrow and involves situations in which "there is no law to apply." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971). See also Aleutian/Pribilof Islands

Association v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 9 IBIA 254, 89 I.D. 196 (1982).

[1] In the present case, appellee has not challenged the Board's jurisdiction to review this decision. Furthermore, as discussed infra, the Board finds that the Deputy Assistant Secretary has stated that his decision was based upon the analysis of legal precedents. Because this decision was not based solely upon an exercise of discretion, it is reviewable by the Board. 1/

Discussion and Conclusions

Decedent's trust allotments were derived under the authority of the Act of February 8, 1887, as amended, 24 Stat. 388, 25 U.S.C. §§ 331-349 (1976) (General Allotment Act). That Act contains the following prohibition against alienation of allotted land: "And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the [25-year period established in this section during which the land shall be held in trust for the Indian allottee by the United States] * * *, such conveyance or contract shall be

1/ This finding does not deny that the ultimate decision whether or not to approve this conveyance may, under 25 CFR Part 152, be discretionary. It merely notes that to the extent the decision was based upon a legal analysis, it is reviewable. See 43 CFR 4.331. To the extent any matter appealed to the Board involves solely the exercise of discretionary authority, the Board, as previously noted, lacks jurisdiction (43 CFR 4.330(b)(2)). In appeals involving both interpretations of law and the exercise of discretion, the Board is required by regulation to refer discretionary matters to the Deputy Assistant Secretary--Indian Affairs (Operations) for the exercise of such discretionary authority (43 CFR 4.337(b)).

absolutely null and void." Act of February 8, 1887, as amended, ch. 119, § 5, 24 Stat. 389, 25 U.S.C. § 348 (1976).

The Secretary of the Interior has promulgated regulations, currently found in 25 CFR Part 152, dealing with the sale, exchange, or conveyance of Indian trust lands. 2/ The regulations in force in 1968, the date of the attempted conveyance, govern whether that conveyance was proper. Section 121.9(a) (1968) stated that "the following classes of land may be sold or exchanged by the Indian owner(s) with the approval of the Secretary of the Interior: (1) Allotted land, and devised and inherited interests therein." Section 121.11 (1968) provided that "[s]ales [of Indian trust or restricted land] will be authorized only if, after careful examination of the circumstances in each case, a sale appears to be clearly justified in the light of the long-range best interests of the owner(s)." Section 121.18(b) (1968) provided an exception to the general standard for determining whether a proposed conveyance was equitable:

> An Indian owner of trust or restricted land my, with the approval of the Secretary, convey land to a member of his or her immediate family for a consideration less than that prescribed in paragraph (a) of this section [the appraised value of the land], or for no consideration. For purposes of this section, immediate family is defined as the Indian's spouse, brothers and sisters, lineal ancestors of Indian blood, and lineal descendants.

These provisions are essentially unchanged in the current regulations and are found in 25 CFR 152.17, 152.23, and 152.25(d).

2/ These regulations were moved to Part 152 by notice published in 47 FR 13327 (Mar. 30, 1982). Previously, these regulations were contained in Part 121.

Decedent's attempted conveyance of certain tracts of his trust land to his daughter in November 1968 comports with these regulations. The warranty deed states the consideration for this conveyance as "One ($1.00) Dollar and other good and valuable considerations." This arrangement was permissible under 25 CFR 121.18(b) (1968). The only apparent problem with the attempted conveyance is that decedent failed to obtain Secretarial approval prior to his death.

[2] Appellants argue that the Secretary has the authority to approve decedent's attempted conveyance despite the intervening fact of his death. This argument is based on well-established legal precedent both of the Department of the Interior and the Supreme Court of the United States. 3/

In George Big Knife, 13 L.D. 511 (1891), the Assistant Attorney General of the United States discussed the "long established practice of the Indian Office and this Department [Interior] to approve Indian deeds, where the transaction was fair in all respects." 13 L.D. at 515. The Assistant Attorney General concluded

> that the fact that the grantor * * * died after the execution of the conveyance and prior to the presentation of the same to the Executive Department for approval has not of itself been considered an obstacle to prevent the proper officer from approving said deed. This long established practice ought not to be now changed, except for cogent and conclusive reasons.

Id. at 516. The Assistant Attorney General specifically modified an earlier contrary opinion he had rendered in Mary Fish, 10 L.D. 606 (1890). Id.

3/ These legal precedents were brought to BIA's attention in a Feb. 13, 1981, memorandum from the Acting Associate Solicitor, Division of Indian Affairs, Office of the Solicitor.

Following receipt of the opinion in George Big Knife, the Acting Secretary approved the deed at issue in that case on July 15, 1891, and, following the same rule, approved the deed that had been questioned in Mary Fish on October 16, 1891. 4/

Judicial precedents similarly uphold the authority to approve conveyances of trust property retroactively. In Pickering v. Lomax, 145 U.S. 310 (1892), the Supreme Court upheld the authority of the President 5/ to approve a conveyance 13 years after its execution and after the death of the grantee and the sale of the land by his administrator. The Court held that "so far as [the Indian grantor] * * * and his grantees are concerned, the approval of the President related back to the execution of the deed and validated it from that time." 145 U.S. at 315.

The Court again considered this case in Lomax v. Pickering, 173 U.S. 26 (1899). In the second case appellant Lomax claimed title to former restricted Indian land under a deed given by the Indian owner 9 years after

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4/ See also Estate of Phillip Tooisgah, 4 IBIA 189, 82 I.D. 541 (1975), aff'd, Tooisgah v. Kleppe, 418 F. Supp. 913 (D. Okla. 1976), in which the Board remanded an appeal to the Administrative Law Judge for a determination of whether Secretarial approval had been given for an assignment of revenues derived from restricted Indian land at the time of the assignment or subsequently and, if no approval had been given, whether there were "compelling grounds for approval now." 4 IBIA at 199-200; 82 I.D. at 546. The Board cited Udall v. Taunah, 398 F.2d 795 (10th Cir. 1968), which in turn cites Lykins v. McGrath, 184 U.S. 169 (1902), (see infra) for the proposition that Secretarial approval can be given even after the death of allottee.

5/ Early treaties and statutes frequently vested authority to approve conveyances in the President. Under the Act of Sept. 21, 1922, 42 Stat. 995, 25 U.S.C. § 392 (1976), this authority was transferred to the Secretary of the Interior.

a similar deed had been given to Pickering's predecessor-in-interest. The Pickering deed had been approved by the President, but not recorded before the second deed was executed. The Court held that the second deed was void and that upon "approval of the first deed [by the President] the title of Robinson [the Indian owner] was wholly divested." 173 U.S. at 31. This "approval was retroactive, and operated as if it had been endorsed upon the [first] deed when originally given." 173 U.S. at 32.

In Lykins v. McGrath, 184 U.S. 169 (1902), the Supreme Court directly considered the questions whether the death of the Indian grantor extinguished the Secretary's power to approve a conveyance of restricted land and whether the interests of the grantor's heirs superseded the interests of the grantee. The Court stated, on the basis of the Pickering cases, that:

> It must, therefore, be considered as settled that the consent of the Secretary of the Interior to a conveyance by one holding under a patent like the present may be given after the execution of the deed, and when given is retroactive in its effect and relates back to the date of the conveyance.
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> But the applicability of the doctrine of relation is denied [by plaintiffs] on the ground that the interests of new parties, to wit, the plaintiffs [heirs of the grantor], have sprung into being intermediate the execution of the conveyance and the approval of the Secretary. But one of the purposes of the doctrine of relation is to cut off such interests, and to prevent a just and equitable title from being interrupted by claims which have no foundation in equity. The doctrine of relation may be only a legal fiction, but it is resorted to with the view of accomplishing justice. What was the purpose of imposing a restriction upon the Indian's power of conveyance? Title passed to him by the patent, and but for the restriction he would have had the full power of alienation the same as any holder of a fee simple title. The restriction was placed upon his alienation in order that he should not be wronged in any sale he might desire

> to make; that the consideration should be ample; that he should in fact receive it, and that the conveyance should be subject to no unreasonable conditions or qualifications. It was not to prevent a sale and conveyance, but only to guard against imposition therein. When the Secretary approved the conveyance it was a determination that the purposes for which the restriction was imposed had been fully satisfied; that the consideration was ample; that the Indian grantor had received it, and that there were no unreasonable stipulations attending the transaction. All this being accomplished, justice requires that the conveyance should be upheld, and to that end the doctrine of relation attaches the approval to the conveyance and makes it operative as of the date of the latter.
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> The plaintiffs have no equities superior to those of the purchaser. They are the heirs of the Indian grantor, and as such may rightfully claim to inherit and be secured in the possession of all that property to which he had at his death the full equitable title; but when, as is shown by the approval of the Secretary, he had received full payment of a stipulated price and that price is ample, and he had been subjected to no imposition or wrong in making the conveyance, then their claims as heirs cannot be compared in equity with those of one who had thus bought and paid full value. [6/]

184 U.S. at 171-73. 7/

Retroactive approval has been denied in cases where there was clear evidence of overreaching or fraud in the procurement of the conveyance. Thus, in Kendall v. Ewert, 259 U.S. 139 (1922), the Court refused to give retroactive effect to Secretarial approval of a conveyance of restricted Indian land when the grantor was mentally incompetent at the time of the

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6/ The fact that the grantee in the present case did not pay the full appraised value of the land conveyed does not deprive her of the protections given by the Court to a bona fide purchaser. As already mentioned, the Department's regulations in effect at the time of the conveyance specifically provided for conveyance of property for less than appraised value to members of the grantor's immediate family. See 25 CFR 121.18(b) (1968).

7/ For similar results, see also Anchor Oil Co. v. Gray, 256 U.S. 519 (1921) and Harris v. Bell, 254 U.S. 103 (1920).

execution of the deed. The Court, citing the Pickering cases and Lykins, stated:

> [T]he doctrine of relation is a legal fiction, resorted to for the purpose of accomplishing justice, "to prevent a just and equitable title from being interrupted by claims which have no foundation in equity." * * * Obviously such a doctrine cannot be resorted to to give validity to a deed obtained [when the grantor was incompetent] * * *. We cannot know that disclosure of the conditions under which it was executed was made to the Department when the deed was approved, but we do not doubt that if a full disclosure had been made approval would not have been given, and the deed must be decreed to be void. [Citations omitted.]

259 U.S. at 148-49. 8/

[3] Thus, it is clear that the Secretary or his delegate has the authority to approve a conveyance of Indian trust lands after the death of the Indian grantor if the Secretary is satisfied that the consideration for conveyance was adequate; the grantor received the full consideration bargained for; and there is no evidence of fraud, overreaching, or other illegality in the procurement of the conveyance. Such approval will be applied retroactively to the date of the attempted conveyance and will extinguish third-party rights arising after the date of the conveyance, including rights acquired through inheritance or devise.

In the present case, the Deputy Assistant Secretary stated in his decision "that there [was] not sufficient evidence to show that this particular transaction, if retroactively approved, would bar possible equitable claims to title." In light of the legal background in which this decision

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8/ In McCurdy v. United States, 264 U.S. 484 (1924), the Court refused to give retroactive effect to certain approvals of the Secretary when retroactivity would subject the lands to local taxation.

was rendered, this statement can only mean that the Deputy Assistant Secretary determined as a matter of fact that decedent did not receive the value for which he bargained or that the transaction was otherwise tainted by fraud, overreaching, or other illegality. 9/

The Board's order of August 1980, referring the warranty deed to the Commissioner of Indian Affairs, also stated that the decision returned to it "should include findings of fact * * * for incorporation in a final decision by the Board for the Department regarding decedent's estate." See 8 IBIA at 149. Although the file contains a request for information from the Agency Superintendent on the circumstances surrounding the execution of the deed, there is no response. Thus, the record is totally devoid of any evidence of legally adequate grounds for denying approval of this conveyance.

Under the circumstances described, the Board sees no alternative to remanding this matter to the Deputy Assistant Secretary for the issuance of a new decision approving or disapproving the warranty deed in question. For the new decision to be legally sufficient it should seek to apply the legal standards recognized in this opinion as controlling in cases where Secretarial approval of deed conveyances is sought after the death of the Indian grantor. A new decision which shows proper regard to the applicable law and the facts at hand, whatever those facts may be, will not be set aside by the Board as it is not the Board's function to substitute its judgment for that of the agency in matters committed to agency discretion. Oglala Sioux Tribe v.

9/ As discussed in note 6, supra, the Secretary has already determined by regulation that when a conveyance is made to a member of the grantor's immediate family, "no consideration" may be adequate consideration.

Commissioner of Indian Affairs and Richard Tall, 7 IBIA 188, 86 I.D. 425 (1979), aff'd, Oglala Sioux Tribe v. Hallett, 540 F. Supp. 503 (D.S.D. 1982). In view of the protracted nature of this warranty deed dispute, it is advised that the Deputy Assistant Secretary seek to render a written decision within 30 days from receipt of this decision.

Following receipt by the Board of the Deputy Assistant Secretary's new decision, the Board will allow interested parties thirty (30) days in which to file exceptions of law, if any, to the decision with the Board. If no exceptions are filed, the Board shall issue a final order concluding this case and incorporating the Deputy Assistant Secretary's decision into a final decision in Docket No. IBIA 80-13.

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Wm. Philip Horton
Chief Administrative Judge

We concur:

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Franklin D. Arness
Administrative Judge

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Jerry Muskrat
Administrative Judge